

HIGH COURT OF AUSTRALIA

GUMMOW, HAYNE AND CALLINAN JJ

RE MICHAEL CARMODY (in his capacity
as Commissioner of Taxation for the
Commonwealth of Australia) & ORS

RESPONDENTS

EX PARTE MICHAEL JOHN GLENNAN

APPLICANT

Re Carmody; Ex parte Glennan
[2003] HCA 32
17 June 2003
S457/2002

ORDER

1. *Notices of Motion respectively dated 5 May 2003 and 22 May 2003 dismissed with costs.*
2. *Application dismissed with costs.*

Representation:

J D Harris SC for the applicant (instructed by Higgins Solicitors)

D B McGovern SC with A J O'Brien for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second respondents

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Re Carmody; Ex parte Glennan

Practice and procedure – High Court of Australia – Decision of single Justice – Application for leave to appeal discontinued – Whether collateral relief available pursuant to s 75(v) of the Constitution.

Constitution, s 75(v).

Judiciary Act 1903 (Cth), s 34.

1 GUMMOW, HAYNE AND CALLINAN JJ. The argument on this motion for
orders absolute in the first instance was heard pursuant to an order dated
10 February 2003 with the appeal in *Glennan v Commissioner of Taxation*¹.
What follows should be read with the reasons for judgment in that case.

2 On 27 June 2000, Kirby J dismissed an application for an order nisi for
prohibition and mandamus and the grant of ancillary relief by way of certiorari
and an order for extension of time made by Mr Glennan against the
Commissioner of Taxation ("the Commissioner") and the judges of the Federal
Court of Australia². An application for leave to appeal was discontinued on
9 April 2001. It is apparent from the transcript of the argument before Kirby J
that, contrary to the assertion now made by the applicant, his Honour was not
sitting in "private chambers".

3 In addition to the orders for prohibition, mandamus and certiorari directed
to the Commissioner and the judges of the Federal Court, a declaration is sought
that the judgment and orders pronounced by Kirby J on 27 June 2000 were null
and void. His Honour has not been joined as a respondent to the application but
the respondents who have been joined were parties to the proceeding before
Kirby J. What is involved in the present application is an attempt, by the use of
the declaratory remedy, to impeach the orders disposing of the earlier application
to a Justice of this Court.

4 Section 34 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") provides
for the appellate process in respect of decisions by single Justices. That avenue
was pursued but then abandoned by the discontinuance on 9 April 2001 of the
leave application.

5 Mr Glennan appears to be of the view, asserted at various stages in the
submissions, that there is conferred by the Constitution rights to proceed by
appeal or by further proceeding in the original jurisdiction of this Court and that
the pursuit and abandonment of the appellate avenue leaves the other still
available to him.

6 In respect of a decision of a Justice of this Court no such duality of rights
exists. The only avenue is that provided by the appeal processes established by
s 73(i) of the Constitution and regulated by s 34 of the Judiciary Act. Thus, it has
been established from the earliest days of the High Court that a Justice of this

1 [2003] HCA 31.

2 *Re Carmody; Ex parte Glennan* (2000) 74 ALJR 1148; 173 ALR 145.

2.

Court is not within the scope of the expression "an officer of the Commonwealth" for the purposes of s 75(v) of the Constitution. Reference may be made to *Federated Engine Drivers' and Firemen's Association of Australasia v Colonial Sugar Refining Co Ltd*³, *R v Murray and Cormie; Ex parte the Commonwealth*⁴, *Re Brennan; Ex parte Muldowney*⁵ and *Re Jarman; Ex parte Cook*⁶.

7 Kirby J gave detailed reasons for judgment in which he identified what appeared to be the four essential matters agitated by Mr Glennan's application⁷. Given his Honour's conclusions, it was unnecessary for him to deal with the application for extension of time.

8 The draft order nisi seeks to re-agitate various grounds involved in those put to Kirby J and this the Court should not countenance.

9 There is also an attempt to put forward, as a new ground, the allegation of "equitable fraud". That ground also was put forward in the appeal in *Glennan v Commissioner of Taxation*. It must fail for the reasons given in that judgment. The same is true respecting the consequences of any failure to issue notices required by s 78B of the Judiciary Act and the proposition that there was a fatal failure by the Commissioner in the proceeding in the Administrative Appeals Tribunal to comply with the requirements of s 37(1) of the *Administrative Appeals Tribunal Act 1975* (Cth), as modified by s 14ZZF of the *Taxation Administration Act 1953* (Cth). Further, there could have been no denial to Mr Glennan of procedural fairness by failure to disclose to him the Taxation Determination TD 93/58 where that ruling did no more than restate the applicable law.

10 The applicant asserts that the proceeding before Kirby J was disposed of by procedures which rendered constitutionally infirm the orders made by his Honour. That submission might properly be made, if at all, in an appeal under the provisions to which reference has been made. In any event, it lacks substance. It is said that the procedures by which this Court deals with

3 (1916) 22 CLR 103 at 117.

4 (1916) 22 CLR 437 at 452-453.

5 (1993) 67 ALJR 837; 116 ALR 619.

6 (1997) 188 CLR 595 at 603, 610, 630, 636.

7 (2000) 74 ALJR 1148 at 1151-1152 [14]; 173 ALR 145 at 150-151.

3.

applications for relief under s 75(v) of the Constitution are dictated by those of "the Court of King's Bench, sitting at Westminster, as at the proclamation of the Commonwealth (1901)". No such court existed in 1901, the Judicature legislation having established the High Court of Justice some 25 years earlier. In *Re Refugee Review Tribunal; Ex parte Aala*⁸, Hayne J emphasised that the remedies mentioned in s 75(v) cannot be co-extensive with their English progenitors.

11 The combination of ss 15 and 16 of the Judiciary Act and O 55 of the High Court Rules provided the foundation for the procedures by which Kirby J dealt with the application in question.

12 The motions dated 5 May 2003 and 22 May 2003 should be dismissed with costs for the reasons given in the judgment on the appeal.

13 The application should be dismissed with costs.

8 (2000) 204 CLR 82 at 140-141 [162].